

The Honorable James L. Robart

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION, a Washington
corporation,

Plaintiff,

v.

MOTOROLA, INC., and MOTOROLA
MOBILITY LLC, and GENERAL
INSTRUMENT CORPORATION,

Defendants.

CASE NO. C10-1823-JLR

MOTOROLA'S [REVISED] BENCH
MEMORANDUM REGARDING THE
ADMISSIBILITY OF EVIDENCE
RELATING TO FTC INVESTIGATION

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Motorola respectfully submits this Revised Bench Memorandum, updating and replacing the previously prepared bench memorandum submitted to the Court by hand today, setting forth its grounds for objecting to Microsoft's attempt to introduce evidence concerning the now-settled investigation by the Federal Trade Commission ("FTC") concerning Motorola Mobility and Google's U.S. licensing practices for standards-essential patents. (*See* Dkt. 807; Microsoft's trial exhibits nos. 0041, 6009, 6056, 6057, 6059, 6060, 6088, 6089, 6090, and 6091.) Motorola respectfully submits that any such evidence should be excluded under Federal Rules of Evidence 402, 403, and 408.¹

ARGUMENT

Evidence relating to either the now-settled FTC's investigations of Motorola Mobility is inadmissible under Federal Rules of Evidence 402 and 403. Such evidence is not probative of any claim or defense in this action and will confuse the jury and greatly prejudice Motorola. In addition, the FTC investigation and consent decree is protected and inadmissible to show liability under Federal Rule of Evidence 408. Accordingly, Motorola respectfully requests that the Court preclude Microsoft from offering evidence and eliciting testimony from Mr. Dailey or any other witness concerning those administrative investigations.

First, evidence and testimony concerning the FTC's Decision and Order dated July 23, 2013, is irrelevant to Motorola's liability in this case for breach of its RAND commitments and allowing it at trial would be highly prejudicial to Motorola. Settlements in administrative actions are not admissions of wrongdoing, and it is appropriate to exclude evidence relating to such settlements under Federal Rule of Evidence 403. For example, in *Point Ruston, LLC v. Pac. Nw. Reg'l Council of United Bhd. of Carpenters & Joiners of Am.*, 2010 WL 3720277 (W.D. Wash. Sept. 17, 2010), plaintiffs asserting racketeering and illegal boycott claims against defendant

¹ This issue could not be resolved earlier because Microsoft refused to identify in advance the exhibits it planned to use with Mr. Dailey other than Motorola's October 2010 offer letters. Because Microsoft refused to identify the exhibits, Motorola was unable to review those exhibits or lodge objections to those exhibits prior to Microsoft calling Mr. Dailey to testify.

1 Carpenters sought to introduce evidence of a consent decree entered in a prior matter settling
 2 claims against Carpenters for illegal boycott. *Id.* at *1. The court excluded evidence relating to
 3 the consent decree because the consent decree did not constitute a judgment against Carpenters,
 4 made clear that Carpenters denied any wrongdoing, and had no relation to the allegations before
 5 the court. *Id.* Similarly, in *Kramas v. Sec. Gas & Oil Inc.*, 672 F.2d 766, 772 (9th Cir. 1982), the
 6 Ninth Circuit upheld the district court's decision excluding a consent decree entered in a prior
 7 SEC enforcement proceeding where the consent decree "involved no finding of culpability and no
 8 judgment of wrongdoing," and there was a danger of prejudice in admitting such evidence of other
 9 wrongful acts, noting that "the prejudicial impact of the evidence upon the jury was obviously
 10 substantial." *Id.*

11 So too, here, the Court should exclude as irrelevant and prejudicial evidence of the
 12 Agreement Containing Consent Order entered into by Motorola and Google and by counsel for the
 13 FTC (entered January 3, 2013, available at <http://ftc.gov/os/caselist/1210120/index.shtml>) ending
 14 the FTC's investigation of Motorola Mobility and Google for their SEP licensing practices. As
 15 the final Decision and Order of the FTC entered July 23, 2013 (Dkt. 807), explains, Motorola has
 16 not admitted any liability in connection with those investigations, and no judgment has been
 17 entered finding that Motorola committed any competition or antitrust violation. To the contrary,
 18 the Decision and Order expressly notes that the Consent Agreement between Google and Motorola
 19 and FTC counsel "is for settlement purposes only and does not constitute an admission by
 20 Respondents that the law has been violated as alleged in such Complaint or that the facts as
 21 alleged in [the FTC's draft] Complaint, other than jurisdictional facts, are true." Dkt. 807-1, at 1.

22 *Second*, introducing evidence or eliciting testimony concerning the FTC investigation,
 23 Decision or Agreement will cause confusion to the jury by necessitating extensive exploration of
 24 collateral matters. As the Ninth Circuit noted in *Kramas*, admission of the evidence of a prior
 25 SEC consent decree "would have opened large areas of proof on collateral matters. The district
 26 court could reasonably conclude that the balance favored exclusion." 672 F.2d at 772. Here, the

1 FTC's Decision and Order is a 26-page single-spaced document setting forth the complex series of
 2 procedures and steps that Google and Motorola would have to undertake prospectively before
 3 seeking to enforce injunctive relief for infringement of their standard-essential patents. Any effort
 4 to enable the jury to understand the FTC Decision and Order would require exposition of the
 5 contours and meaning of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, the
 6 statutory provision under which the FTC investigation was conducted. Thus, in order for the
 7 Court to put in context for the jury the factual and procedural background relating to the FTC
 8 proceeding, it would take a virtual mini-trial that would be wasteful to the resources of the jury
 9 and the Court.² This Court has previously recognized that the parties should not inject into this
 10 phase of the case collateral matters that have no bearing on Microsoft's claims for breach. For
 11 instance, the Court granted Microsoft's motion *in limine* to bar Motorola from offering evidence
 12 that Microsoft breached RAND commitments to the SD Card Association and Microsoft's own
 13 interoperability principles, because "[t]here is a high risk of delay and confusion, and,
 14 furthermore, a high risk of taking a lot of time to lay a foundation for that and explain the
 15 relevance of it for actually no purpose." 8/13/13 Tr., 23:13-16. The Court similarly should bar
 16 any introduction of the FTC investigation and consent agreement here.

17 The risk of jury confusion from any introduction of the FTC agreement is further
 18 illustrated by the fact that the consent decree has been subject to confusing and contradictory
 19 interpretations by commentators and even by the Commission and its staff themselves. For
 20 example, when the January 3, 2013 consent agreement was first entered, some Commissioners and
 21 Commission staff suggested that it might bar Motorola and Google from continuing to pursue

22
 23 ² For instance, Microsoft's trial exhibit 6091 ("Analysis of a Proposed Consent Order to Aid Public Comment,"
 24 January 2013) is an analysis reflecting the FTC Decision and Order as accepted for public comment in January of
 25 2013, as opposed to the final Consent Order that was adopted this July. Exhibit 6091 must be viewed in conjunction
 26 with the final entered Consent Order from July 2013. Likewise, Microsoft's trial exhibit 6009 is a statement from the
 FTC saying that the settlement "requires Google to withdraw its claims for injunctive relief on FRAND-encumbered
 SEPs around the world"—***but this statement was later disavowed as an inaccurate description of the January 2013
 proposed Order.*** Placing Microsoft's proposed exhibits in the appropriate context will open large areas of proof on
 collateral matters that will unnecessarily waste time and confuse the issues for the jury.

1 pending claims for injunctive relief. *See, e.g.,* Liz Gannes, *Microsoft Contends FTC-Google Deal*
 2 *Kills Pending Motorola Patent Cases*, All Things D, Jan. 7, 2013, available at
 3 [http://allthingsd.com/20130107/microsoft-contends-ftc-google-deal-kills-pending-motorola-](http://allthingsd.com/20130107/microsoft-contends-ftc-google-deal-kills-pending-motorola-patent-cases/#)
 4 [patent-cases/#](http://allthingsd.com/20130107/microsoft-contends-ftc-google-deal-kills-pending-motorola-patent-cases/#) . But the FTC later clarified in its response to comments (Dkt. 807-2), filed
 5 concurrently with the final July 23, 2013 Decision and Order, that the Agreement to Consent
 6 Order had never in fact required any withdrawal of Motorola’s injunction claims on its SEPs. To
 7 the contrary, the final Decision and Order states that, while “[s]ome commenters question whether
 8 the Order requires Google to immediately withdraw all pending legal claims that seek injunctive
 9 relief, *if it does not*,” and noted in a footnote that “[a]n Order is interpreted by its terms alone, and
 10 those terms are not modified by ancillary documents or statements made by the Commission or
 11 Commission staff.” Dkt. 807-02 at 4 & n.11 (emphasis added). The same confusion over the
 12 meaning of the consent agreement was again illustrated in Microsoft’s own counsel’s remarks
 13 today. *See* 8/28/13 Tr. 50:19-51:14 (argument of Mr. Pritikin) (“There was an order that was
 14 entered ... in January 2013. . . The order, as it was originally entered, there may have been some
 15 ambiguity in it. We think that it required that they drop their standards-essential patents at that
 16 time that were being asserted, at least for injunctions, against Microsoft. In the final order that
 17 was issued there was a clarification of that. I’m not clear that it would cover the pending
 18 actions,...”). If even commissioners, staff and counsel cannot be certain about the implications
 19 of the FTC agreement, the potential for its introduction to cause profound jury confusion is
 20 evident.

21 It is no answer for Microsoft to argue, as its counsel did today, today that Motorola opened
 22 the door to evidence relating to the FTC consent order by offering testimony from Mr. Dailey
 23 about his subjective intent and “pure heart” in sending the October 2010 RAND offer letters to
 24 Microsoft. *See* 8/28/13 Tr. 49:11-50:16. Mr. Dailey’s testimony was limited to Motorola’s good
 25 faith RAND offers; Motorola did not offer any testimony from Mr. Dailey relating to Motorola’s
 26 intent in seeking injunctions. In contrast, the FTC’s final Decision and Order *only* addresses

1 future claims for injunctive relief, not the requirements for a “RAND offer.” *See* Dkt. 807-1.
 2 Accordingly, evidence concerning the FTC proceedings is not relevant under Federal Rule of
 3 Evidence 402, and such evidence is prejudicial and misleading under Federal Rule of Evidence
 4 403. Moreover, an investigation begun in 2012, and an agreement reached in January 2013 and
 5 finalized in July 2013, can have no relevant bearing upon Mr. Dailey’s earlier intent in October-
 6 November 2010, the relevant time frame for the offer letters. As the Court has already held in its
 7 ruling on the parties’ *Daubert* motions, “Monday morning quarterbacking is an easy job, but
 8 decisions by companies are certainly made in real time and on circumstances that existed at that
 9 time. To say ex post that a decision made was actually a good one is irrelevant to the factors that
 10 went into the decision, unless the ex post events were evaluated prior to the actual decision.” Dkt.
 11 822 at 18 (precluding Microsoft’s German law expert, Dr. Theo Bodewig, from offering EC’s
 12 subsequent statements in connection with Microsoft’s earlier Orange Book decisions). Mr.
 13 Dailey’s subjective good faith cannot be judged in the light of events that transpired years after his
 14 own relevant actions.

15 In short, given the limited scope of this phase of trial, as well as the parties’, the jury’s,
 16 and the Court’s interests in resolving this case efficiently within the time allotted, the balance
 17 favors excluding such extraneous evidence of unrelated administrative proceedings under Federal
 18 Rule of Evidence 403.

19 *Third*, the FTC consent decree is in any event inadmissible under Federal Rule of Evidence
 20 408. Rule 408 prohibits the admission of evidence of settlements, as well as conduct and
 21 statements made during compromise negotiations, to prove liability. This prohibition applies to
 22 civil consent decrees executed with government agencies. *See, e.g., New Jersey Tpk. Auth. v. PPG*
 23 *Indus., Inc.*, 16 F. Supp. 2d 460, 473 (D.N.J. 1998), *aff’d*, 197 F.3d 96 (3d Cir. 1999) (“Courts
 24 agree that Rule 408 applies to civil consent decrees executed with government agencies . . . Here,
 25 there is no question that [defendant] entered into the 1990 [consent decree] in order to compromise
 26 a disputed claim; accordingly, Fed. R. Evid. 408 bars reliance upon it as evidence of liability.”).

In this case, Motorola Mobility's settlement of the FTC investigation, along with evidence of Motorola Mobility's statements and conduct in cooperating with the FTC, are protected under Rule 408 and cannot be introduced by Microsoft to show Motorola is liable for any RAND breach. For this additional reason too, the Court should exclude any such evidence offered by Microsoft.

CONCLUSION

For the foregoing reasons, Motorola respectfully submits that the Court should preclude Microsoft from introducing evidence or eliciting testimony concerning the FTC investigation.

DATED this 29th day of August, 2013.

Respectfully submitted,

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